

Women's Access to Justice: Texts and Contexts

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Executive Summary

Law can be the site through which women's dignity and equality can be expressed and pursued. Speaking the language of rights translates one's needs from private interests to public claims through words and concepts that the community – local, national and/or international – have already validated. Law can therefore offer a medium to confront the injustices and unfairness built into other systems of political, social and economic ordering. Women's rights advocates have won significant victories through law and have generated gains for women's dignity and equality.

However, law can also be a place where women's rights are not only silenced but where social, economic and political power structures are replicated and work against women's rights. Rule of law programming focused on women's rights and democratic governance must therefore begin with a clear definition of the rule of law, a careful analysis of the causes of women's inequality and the context in which it is perpetuated and sustained, coupled with an ability and desire to harness law as an instrument of social change that is tempered by a sober understanding that law is unpredictable and complex in its results.

This paper proceeds in several parts. First, it identifies the key issues relating to women's democratic governance, women's rights and the rule of law. While scholars and advocates have advanced theorizing and use of law in support of women's needs and interests, much conceptualization, implementation and assessment or evaluation work remains to be done.

The second part identifies the importance of normativity and power relations for feminist theorizing. Feminist conceptions of the rule of law recognize that law is shot throughout with social and economic power and that harnessing women's emancipation to law is fraught with uncertainties and complications. Social, political and economic inequality inevitably replicate themselves as substantive, procedural and social barriers to access to justice. At the same time, feminist theorizing around the rule of law also recognizes the importance of using law to speak truth to power and to gain access to the sites in which social relations are defined and consolidated. Feminists increasingly recognize the value of using law to promote women's dignity but remain uncertain about how to judge the result of their efforts.

The final sections of this paper discuss the different barriers to access to justice that face elite and marginalized women, the possible roles that NGOs can play in the realization of women's rights, and the potential for mutually interdependent and reinforcing roles that women in various positions of power can play in promoting women's rights more generally. These considerations prove important to devising access to justice strategies in a particular case and to strategizing around long term policy development because they illustrate the institutional and social barriers and possibilities facing women in different contexts.

Methodology

This paper uses the research questions advanced by IDRC as the main intellectual frame. Because the wide range of issues and the vast geographic scope under consideration, it was not possible to undertake or provide a comprehensive literature review or annotated bibliography. The research was nonetheless comprehensive in the sense that all legal private and public databases (e.g. JSTOR, Lexis, Westlaw, Women's Human Rights Resources, Google Scholar) were reviewed with an eye to responding to the questions posed and identifying appropriate case studies to illustrate the various points made. In addition, Internet searches were conducted to identify NGO's working in the rule of law area around the globe to determine the type of work in which they were engaged and to identify and analyze reports of their activities. Case studies were selected with the intent of canvassing as wide a geographic range as possible and having regard for the extensiveness of the analysis offered. I also drew on my own experiences with rule of law programming in Palestine over the last 10 years and my experience of teaching an access to justice course for the last 7 years with the benefit of input from colleagues at the University of Windsor. Where citations are provided, I sought to provide at least one reference to open-access Internet based resources over sources available on commercial databases because open-access resources, while not fully accessible to all, at least have the virtue of being more accessible than commercial counterparts while the commercial sources tend to be more comprehensive.

The methodological limits to this study and studies involving women's access to justice around the globe include:

- A. Access to information - women's experiences are often not documented in written form; this research is being conducted exclusively in English but women's experiences to the extent they are documented may be available in other languages, not English.
- B. Conceptual Problems - the basic concepts such as "rule of law" and "women" are not always clear or coherent; this leads to assumptions which may ultimately paper over some important questions that require careful and sustained analysis
- C. Geography - it is impossible to generalize across women's experiences; case studies are used to illustrate but caution must be had in drawing general lessons from specific studies
- D. Context is key – it is impossible to generalize about women's human rights strategies or the relationship of rule of law initiatives for governance.

Legal strategies sometimes work to promote women's rights and sometimes they do not. Recent experiences have determined that successful legal strategies must be planned and implemented with a knowledge of a particular social context not only because legal norms, precedents and strategies are culturally or locally defined but because successful legal strategies generally exist alongside successful social mobilization and education strategies which can only be carried out by those who know and understand the social context within which they are working.

1. Introduction

Democratic development entails not only a system of governance defined by "one person, one vote" but also implies that those living within a particular jurisdiction should be treated as beings worthy of equal respect and dignity. Law is not only an instrument of governance but also a means through which individuals and groups seek affirmation of their right to live with dignity and respect. Women's rights to democratic development therefore imply the right to equal benefit and protection of the law.¹ In jurisdictions around the world, formally democratic or not, women's rights are violated. Women disproportionately suffer from poverty, they are denied the right to participate in the civil and political life of their nation on equal terms with men, they suffer in gendered ways during times of war, they face violence at home and inequality in the workplace. Such violations both highlight women's inequality and prevent them from pursuing a life defined by dignity and equality.² Not surprisingly, women's rights scholars, policy-makers and activists are increasingly turning to the law as one site in which women's rights can be realized.

Law can be a site through which women's dignity and equality can be expressed and pursued. Speaking the language of rights translates one's needs from private interests to public claims through words and concepts that a community – local, national and/or international – has already validated.³ Law can therefore offer a medium to confront the injustices and unfairness built into other systems of political, social and economic ordering.⁴ Women's rights advocates have won some significant victories through law and have generated gains for women's dignity and equality.⁵ However, law can also be a place where women's rights are not only silenced but where social, economic and political power structures are replicated and work against women's rights.⁶

¹ Without this normative dimension, the quest for democracy and the emphasis on rule of law risks new global hegemonies. Avtar Brah and Ann Phoenix, "Ain't I A Woman? Revisiting Intersectionality" (2004) 5(3) *Journal of International Women's Studies* 83 available online: <http://www.bridgew.edu/Soas/jiws/May04/Phoenix_Brah.pdf>.

² See for example the Concluding Observations issued by CEDAW in response to various country reports filed under the Women's Convention available online: <<http://www2.ohchr.org/english/bodies/cedaw/>>.

³ Legal theoreticians often articulate rights claims as the public demand for recognition as a person of equal dignity. Rights claims convert private experiences of pain, tragedy and trauma into public narratives that demand respect, recognition, explanation and accounting. As Lynn Freedman puts it, rights claims are both declarative and constitutive of "the right to be seen, to be heard, to be listened to" "Human Rights and Women's Health" in Marlene Goldman and Maureen Hatch, eds., *Women and Health* (New York: Academic Press, 2000) 428 at 434). In the same vein, Patricia Williams contends that invoking the language of rights "elevates one's status from human body to social being" *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge: Harvard University Press) at 153.

⁴ For example, critics charge that the Millennium Development Goals justify trade-offs between economic development and gender equality and suggests how international human rights norms can be harnessed to alternative approaches for poverty reduction. See Christina Holder, "A Feminist Human Rights Approach for Engendering the Millennium Development Goals" (2007) 14 *Cardozo J.L. & Gender* 125.

⁵ See for example the discussion in Amira Mashhour, "Islamic Law and Gender Equality - Could There Be a Common Ground: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt" (2005) 27 *Hum. Rts. Q.* 562.

⁶ Catherine McKinnon, for example, questions why the world has not mobilized against violence against women in the way that it has mobilized against the September 11 terrorist attacks though a "war" against women has been waged across the globe for decades. See "Women's September 11: Re-thinking the International Law of Conflict" (2006) 47(1) *Harv. Int'l L.J.* 1. Also see the discussion of how freedom of conscience has been used to bolster

Democracy promotion can also produce negative results for vulnerable and marginalized groups, women included. At least some experts contend, for example, that the campaign for democratization in Iraq has coincided with the drastic demise of women's well-being.⁷ Current analysis of legal reforms and democratization in the Middle East more generally suggests that legal reforms, taken on their own, have not generated positive political change. Others caution that the relationship between democratization and legal reform has proven troubled and generated suffering in Latin America.⁸ Part of the problem arises when reformers equate democratization with legal reform and believe that legal reforms drive democratization. Even more worrying than the tendency on the part of reformers and policy-makers to equate legal reforms and democratization is the willingness to harness democracy to justify violating rights of those who are deemed to live in less democratic regimes.⁹

Rule of law programming focused on women's rights and democratic governance must therefore begin with a clear definition of the rule of law – a definition which recognizes and is fully committed to the human rights of all people living within a given jurisdiction – and a careful analysis of the causes of women's inequality and the context in which it is perpetuated and sustained. Rule of law programming focused on women's rights and democratic governance must also build alliances with a range of individuals and institutions that have an ability and desire to harness law as an instrument of social change.¹⁰ Rule of law programming must also be tempered by a sober understanding that law is unpredictable and complex in its workings.

This paper proceeds in several parts. First, it identifies the key issues relating to women's democratic governance, women's rights and the rule of law. The second part identifies the importance of normativity and power relations for feminist theorizing around the rule of law. Feminist conceptions of the rule of law recognize that law is shot throughout with social and economic power and that harnessing women's emancipation to law is fraught with uncertainties

religious laws in some Indian communities that undermine women's rights. Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (New Delhi: Sage Publications, 1992).

⁷ See for example, Natalie Tovmasyan Riegg, who discusses the problems of women's liberation and the implication of Western feminism in the politics of oppression: "In other words, it looks as though, in today's feminism, the problem of *Woman as Other* is being increasingly complemented by the problem of *the Other Woman*," emphasis in original. "The Theory and Practice of Promoting Democratization: Women's Issues" (Paper presented to the International Studies Association Southern Region Annual Conference, Miami, 3 November 2005), online: <http://www.isa-south.org/2005%20Miami%20Papers_files/D4_Natalie_Riegg.pdf> at 16.

⁸ Julio Faundez, "Democratization Through Law: Perspectives From Latin America," *Democratization* (2005) 12(1) 749.

⁹ There is a long standing tradition in law to the effect that less civilized people or nations are not entitled to or worthy of the equal benefit and equal protection of law. See for example, Elbridge Colby, "How to Fight Savage Tribes" (1927) A.J.I.L. 21(2) 279 and the discussions offered in Antony Anghie's concern "with understanding the strategies by which international law rewrites its history, in different phases, and, in particular, how it seeks to suppress the colonial foundations of the discipline:" "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) 40 Harv. Int'l L.J. 1 at 8; See also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004); Frédéric Mégret, "From 'Savages' to 'Unlawful Combatants': A Post-Colonial Look at International Humanitarian Law's 'Other,'" in Anne Orford, ed., *International Law and its "Others"* (Cambridge: Cambridge University Press, 2006); and Mark Mazower, *An International Civilization? Empire, Internationalism and the Crisis of the Mid-Twentieth Century* (2006) *International Affairs* 82(3) 553

¹⁰ These issues will be discussed more fully in the section: "Constrained Legalism:" Combining the Legal and Extra-Legal."

and complications. At the same time, feminist theorizing around the rule of law also recognizes the importance of using law to speak truth to power and to gain access to the sites in which social relations are defined, evaluated and consolidated. The final sections of this paper discuss the different barriers to access to justice that face elite and marginalized women, the possible roles that NGOs can play in the realization of women's rights, and the possible mutually interdependent and reinforcing roles that women in various positions of power can play in promoting women's rights more generally. The very last section sets out areas for further research and analysis. While scholars and advocates have significantly advanced the thinking about and harnessing of law in support of women's needs and interests, much conceptualization, implementation and assessment or evaluation work remains to be done.

2. Feminist Conceptions of the Rule of Law

While "rule of law" rhetoric has flourished in policy circles,¹¹ it is important to be clear about the meaning of the rule of law being employed in any given context because insistence on "the rule of law" can have potentially disastrous outcomes for equality seekers.¹² At its core, the "rule of law" stands in opposition to arbitrary and biased decision-making. Beyond this core understanding, there is little agreement about the meaning or value of rule of law agendas.¹³ Indeed, "rule of law" agendas have historically been advanced to justify imperialism and colonialism and "rule of law" discourse continues to have negative consequences for women across the globe.¹⁴ The problem has several dimensions. First, positivistic conceptions of the "rule of law" promote respect for the law regardless of its normative content, on the claim that the laws in question are the product of a legitimate process of rule making (generally but not always a democratic process).¹⁵ Such an approach emphasizes enforcement of laws on the books and can prove consistent with the tyranny of the majority (or those who are otherwise politically powerful). It purportedly aims at economic, social or political stability but not necessarily social justice, in part because it sidelines or silences the voices and interests of a segment of the population, particularly those who are politically, socially or economically marginalized. One can point to rule of law reforms in Palestine as an example.¹⁶

¹¹ For a critical overview, see Thomas Carothers, "Promoting the Rule of Law Abroad: The Problem of Knowledge" (2003) *Carnegie Rule of Law Series: Democracy and Rule of Law Project*, 34 online: <<http://www.carnegieendowment.org/files/wp34.pdf>>.

¹² The best introduction to different conceptions of the rule of law and the importance of these conceptions for legal decision-making remains the fictional set of decisions in Lon Fuller "The Case of the Speluncean Explorers" (1949) 62(4) Harv.L. Rev. 616 and "The Case of the Speluncean Explorers: Contemporary Proceedings" (1993) 61 Geo. Wash. L.R. 1754. For a more extensive and grounded discussion, see Brian Z. Tamanaha *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).

¹³ See for example, Richard H. Fallon, "'The Rule of Law' as a Concept in Constitutional Discourse" (1997) 97(1) Colum. L. Rev. 1.

¹⁴ See for example Fionnuala Ni Aolain and Michael Hamilton, "Gender and the Rule of Law in Transitional Societies" (2009) 18(2) Minn. J. Int'l L. 380.

¹⁵ See the brief discussion in "Rule of Law as a Goal of Development Policy" World Bank, Law and Justice Institutions, online: <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20763583~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062~isCURL:Y,00.html>>; For a broader discussion see Tamanaha, *supra* note 11.

¹⁶ Mudar Kassis, "Rule of Law Without Freedom! The Case of Palestine" Paper presented at the annual meeting of the The Law and Society Association, Jul 06, 2006 <Not Available>. 2009-05-25 <http://www.allacademic.com/meta/p115395_index.html>

Other conceptions of the rule of law pay attention to the normative dimensions and implications of law-making and enforcement. Rule of law agendas, within this framework, are to be promoted and respected not simply because they are the product of a particular formal process but because they aim towards a particular valued result such as the equal dignity and worth of all peoples. Such an approach is more feminist in its orientation because it explicitly and clearly aligns itself with just outcomes.¹⁷ While feminists disagree about the nature and scope of the feminist project, they do tend to agree that the rule of law, broadly understood, commits feminists to not only ask “the woman question” but to approach law with an understanding that it is not a neutral medium but one that reflects forms of power.¹⁸ In particular, feminist legal theorists and reformers pay attention to:

- Gaining an understanding of women’s lived realities and needs through sustained consultation
- Carefully defining the normative elements which must be embodied by and promoted through the law (e.g. equality, dignity, autonomy, physical integrity)
- Adopting a progressive interpretive strategy of a given legal text that is consciously harnessed to respond to women’s defined needs
- Remaining attentive to the impact of law and law reform on women’s lives
- Remaining cognizant of the power relations within the law
- Always being aware of the intersection of gender with other constructs of identity such as race and class which work to ensure that women’s experiences are different across such identities¹⁹
- Ensuring commitment to carefully analyzing legal strategies but also aware of the need to de-center law and use multiple strategies

This core understanding of the rule of law from a feminist perspective arose largely in response to conceptions of the rule of law which focused on ensuring that laws were created according to a legitimate process. Feminists ask not only about the process which gives rise to law but also adopt a critical stance in relation to law, always cognizant of whose interests are reflected in law.

Beyond these core points, however, feminist conceptions of and experiences with law remains highly contested. Of course, the above leaves open important questions such as, “what normative values should be adopted and advanced as part of any understanding of the rule of law? Are these values universal and to what extent, if at all, do they have specific cultural content?”²⁰ For example, is the concept of human dignity a universal value that can be accepted

¹⁷ Some who adopt such an approach to the rule of law prefer the phrase “access to justice” primarily because the word “access” implies the right to make a claim before a decision-maker while the word “justice” implies the need to address whether the norms which are being used in judgment are themselves fair. It should be noted and I am mindful of the fact that there is no single conception of “feminism” and that different feminists might line up differently in relation to different conceptions of the rule of law as well as specific legal reforms.

¹⁸ See Chapter 1 in Martha Chamallas, *Introduction to Feminist Legal Theory*, 2d ed., (New York: Aspen Publishers, 2003)

¹⁹ Hilary Charlesworth “Whose Rule? Women and the International Rule of Law” in Spencer Zifcak ed., *Globalization and the Rule of Law* (London: Routledge, 2005) 83

²⁰ This question is raised, for example, when states invoke Islamic Shar’ia to reserve against international human rights treaties. See United Nations Division for the Advancement of Women, Reservations to CEDAW available online: <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>.

across cultures and histories?²¹ If so, does human dignity tolerate different content in different contexts? If it tolerates different content across contexts, does it nonetheless have a minimum core set of requirements that are the same across contexts and cultures?²² These questions prove highly contentious within feminist literature and will be discussed in further detail below. Nonetheless, while feminists might disagree about the precise content of legal rules and the strategies needed to achieve dignity and equality, they do agree on the need to be aware of law's hegemonic potential.

3. Beyond Apology and Utopia: Litigation, Law Reform and Social Change

Feminists have become particularly interested in whether law reform can have the impact promised by legal reformers and hoped for by rights claimants.²³ This is a complicated question that evokes various responses from experts, often depending on their particular social and activist orientation and/or legal philosophy.²⁴ Initially, women's rights scholarship focused rather uncritically on the means and methods needed to achieve a particular end: the scholarship was largely doctrinal in nature and concerned itself predominantly with legal texts and legal interpretations. Inspired by Critical Legal Studies (CLS), skeptics began to challenge law's ability to facilitate social change. CLS holds that the "rule of law" is a myth used to hide power within the law. Law is inherently unstable, according to this argument, and cannot be the site of social change.

Skepticism has also been fuelled by empirical case studies. Perhaps the best known study of the relationship between legal reform and social change focused on school segregation in the United States following the US Supreme Court's order to de-segregate schools.²⁵ Seeking to change society exclusively through legal reform was declared a "hollow hope."²⁶ Critics noted that schools in fact became more segregated after the famous *Brown v. Board of Education* decision in which the Supreme Court of the United States ordered the de-segregation of schools.²⁷ Reviewing women's rights campaigns in areas such as rape and pornography, Carol Smart

²¹ *The Universal Declaration of Human Rights, The Arab Charter on Human Rights and the African Charter on Human and Peoples Rights*, for example, all give primacy to human dignity in their preambles.

²² Darren Rosenblum, "Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods" (2007) 45 Colum.J. Transnat'l L. 759.

²³ See generally Michael McCann, ed., *Law and Social Movements* (London: Ashgate, 2008)

²⁴ William Bogart has helpfully divided the literature into several models of the relationship between law and social change. William Bogart, *Consequences: The Impact of Law and Its Complexities* (Toronto: University of Toronto Press, 2002).

²⁵ Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 2d ed. (Chicago: University of Chicago Press, 2008)

²⁶ Perhaps those outside of law were not surprised by this declaration. However, lawyers themselves had become largely insular and often failed – and continue to fail – to adopt multi-disciplinary knowledge or have regard for social science or social context in developing their legal strategies. See Rosenberg, *ibid*.

²⁷ For an overview of the skeptical arguments about de-segregation, see Amy Stuart Wells, Awo Korantemaa Atanda, Jennifer Jellison Holme, Amina Humphrey, and Anita Revilla, "In Search of Brown: The Unfulfilled Promise of School Desegregation in Six Racially Mixed High Schools" (*Paper presented at the annual meeting of the American Sociological Association, Atlanta, 16 August 2003*) online:

<http://www.allacademic.com/meta/p106943_index.html> The authors see value in the de-segregation experience.

concluded in *Feminism and the Power of Law* that rights discourse “has become more of a power against women than in favour of feminism.”²⁸

Some argue that law, because it is created, interpreted and enforced by those with interests in maintaining the status quo will only ever produce limited change.²⁹ In other words, it serves more of a disciplining function than an emancipatory one. In the end, law co-opts reformers and delegates women’s rights to a secondary status. Analysts, for example, charge that the local Gacaca courts established in Rwanda to counter the access to justice problems associated with national and international tribunals remove women’s abuses from this form of community based justice because the courts originally did not handle cases involving sexual violence.³⁰ Others question whether the more formal courts and tribunals created to promote transitional justice re-traumatize women because the individual gets lost in the larger quest to remain true to evidentiary principles or establish precedents.³¹ A third group of observers note that once disputes are transformed into legal questions, they become inaccessible to even the people involved the disputes and their supporters because of the legal jargon and procedures invoked by lawyers and because direct action strategies are often discouraged by legal elites who are often unfamiliar or uncomfortable with such strategies.³²

Still others question the capacity of legal reforms to change political decision-making. Feminists debate whether pursuing legal agendas represents the best strategy for advancing women's rights.³³ “Rights-talk” has the capacity to distort women’s experiences by forcing them into preconceived categories of meaning, puts decision-making into a system which does not fully understand or acknowledge its own power dynamics, and deflects valuable resources away from other strategies such as political mobilization and lobbying. Rights-talk, according to some, also dilutes our ability to conceive of an altogether different world order because “to the extent that people are 'afflicted' by legal thinking . . . counterhegemonic thought will simply make less sense, simply be harder to think”³⁴

²⁸ (London, Routledge, 1989) at 3.

²⁹ See for example Margareth Etienne, “Addressing Gender-Based Violence in an International Context” (1995) 18 Harv. Women’s L.J.139 (arguing that the normative framework of international women’s human rights limits its potential) and Alice Edwards, “Violence Against Women as Sex Discrimination: Judging the Jurisprudence of the United Nations Human Rights Treaty Bodies” (2008) 18 Tex. J. Women & L. 1 arguing that forcing violence against women into sex discrimination norms fractures women’s experiences and leads to uneven decision-making.

³⁰ Sarah L. Wells, “Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda” (2004/05) 47 S. Cal Rev. L. & Women’s Stud. 167. For a brief discussion, see Anne Marie Goetz et al. *Who Answers to Women?* “Progress of the World’s Women 2008-2009, Chapter 5, Justice (UNIFEM, 2009) online: <http://www.unifem.org/progress/2008/justiceFS_box5b.html>.

³¹ Katherine Franke, “Gendered Subjects of Transnational Justice” (2006) 15(3) Colum. J. Gender & L. 813 (she suggests mechanisms that prove respectful of testimony as individual suffering but unfortunately does not deal with the fact that the testimony is also evidence that is to be tested for its veracity in what largely remains an adversarial system).

³² See the discussion in Austin Sarat and Stuart A. Scheingold eds., *Cause Lawyers and Social Movements* (Stanford: Stanford University Press, 2006)

³³ For an overview of the debate, see Reem Bahdi, “Analyzing Women's Use of the Internet through the Rights Debate”, (2000) 75(3) Chicago-Kent L.Rev.869.

³⁴ Francesca Polletta “The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961-1966” (2000) 34(2) Law & Sociology Rev. 367 (citing Kelman) at 367.

Yet, the most marginalized often prove the most reluctant to give up on law as a site of social change. Critical Race Scholars (CRS), including feminists within their ranks, helped lead the way back to law and legal strategies for social change. The CLS and larger skepticism towards law failed, according to CRS, to take suffering seriously and failed also to recognize the ability of those who suffer to maintain a “dual consciousness” which accommodates “both the idea of legal indeterminacy as well as the core belief in a liberating law that transcends indeterminacy.”³⁵ “Rights-talk” allows marginalized peoples to speak the language of the powerful. It therefore has the potential to force those who hold positions of power to live up to their professed commitments to equality and dignity of the individual and creates a common language through which those who hold power can come to recognize diverse experiences and needs. As Carol Smart has put it,

The person seeking her rights is not a supplicant or a seeker of charity, but a person with dignity demanding a just outcome according to widely accepted criteria of fairness.³⁶

Moreover, law is no more susceptible to co-optation than other tools or strategies.³⁷ Ultimately, feminists have no choice but to engage with law: it is everywhere - international, regional, national and local. It is used by those in power to justify violations against women and shapes our understandings of ourselves and our relationships with others. As Celina Romany reminds us, “rights are defined by those who talk about them.”³⁸ Law has played an important though difficult to document role in shaping public policy debates and one cannot separate legal strategies from political ones.³⁹ Law also defines the expectations and regulates conduct of people in relation to each other. For example, a case study of women and land in Uganda demonstrates how reformers were able to harness an ethos of justice to claim their rights in the community. The language of rights proved not only useful in formal legal claims but also helped channel their conversations with community members.⁴⁰

Recent feminist scholarship thus remains attentive to the barriers that women and other equality seekers face. Rather, than rejecting law, however, analysts and reformers seeks strategies to overcome the barriers. They adopt a stance characterized by “*constrained legalism*, which strategically deploys law in a way that is neither utopian in its hopes for legal reform nor rejectionist in its dismissal of legal avenues of transformation.”⁴¹ Some constrained legal strategies are discussed in the final sections of this paper. Before such strategies can be

³⁵ Mari Matsuda, “Looking to the Bottom: Critical Legal Studies and Reparations” (1987) 22 Harv. C.R. –C.L.L. Rev. 323 at 341

³⁶ Smart, *supra* note 28 at 152.

³⁷ Orly Lobel, “The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics,” (2007) 120 Harv. L. Rev. 937.

³⁸ Celina Romany, “State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law” in Rebecca Cook ed. *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 85

³⁹ Unwilling to abandon’s law’s promise, some respond to the skepticism that has been generated around law’s role in denouncing racialized school segregation by emphasizing that the de-segregation litigation changed public expectations and debates around segregation. Kevin Welner, *Legal Rights, Local Wrongs: When Community Control Collides with Educational Equity*. (Albany, NY: State University of New York Press, 2001)

⁴⁰ L.S. Khadiagala, “Justice and Power in the Adjudication of Women’s Property Rights in Uganda” (2002) 49(2) Africa Today 101.

⁴¹ Scott L. Cummings, “Critical Legal Consciousness in Action” (2007) 120(39) Harv. L. Rev. F. 62.

fashioned, however, an understanding of the barriers facing women is necessary. The next section of the paper discusses the considerations that must be brought to bear on such knowledge claims.

4. Where – and Who - Are the Women?

Feminist legal strategies begin with an understanding of women's lives as a pre-requisite to reading legal texts. In other words, feminist approaches to law emphasize the need to understand women's needs before engaging the text. Otherwise, law can be used to entrench rather than liberate women and important priorities for women can be overlooked simply because the legal texts – often not surprisingly – do not acknowledge them. *The Women's Convention* offers a good example. The *Convention* does not explicitly prohibit violence against women although women around the globe suffer from violence that is perpetrated against them in both public and private spaces. As they became educated about the incidence and dynamics of violence against women, CEDAW eventually held that the *Women's Convention* must be understood as protecting women from violence – despite the absence of textual language to this effect – because the other rights encompassed within the treaty would be diluted if violence is ignored.⁴² Consultation and commitment to understanding women's lived realities are therefore integral to defining a women's access to justice strategy. Scholars and reformers highlight the importance of two key conceptual tools in shaping access to justice strategies that respond to women's needs and realities.

An understanding of the different conceptions of equalities is the first tool needed to ensure that legal strategies are ultimately fashioned with women's experiences and needs in mind. The essence of any campaign for women's rights rests on the demand, either implicitly or explicitly made, for equality. It is often necessary to understand how different conceptions of equality can help make visible ways in which the law has failed to address women's needs. The two main categories of equality are formal equality and substantive equality.

Formal equality requires equality of treatment or the identical application of a rule between men and women. Such a conception of equality, however, is limited because men's and women's needs often prove different in different contexts.⁴³ Women, for example, might require accommodations in the workplace in the event that they become pregnant or have child care responsibilities. Formal equality would not be violated if an employer refused maternity benefits to a woman provided that she is being treated the same as a man. In such circumstances, substantive equality or equality of ends may prove more consistent with understanding women's needs and ultimately fashioning a campaign for women's rights than formal equality. Substantive equality might demand that women receive special protection because they are women and not simply in comparison to men.⁴⁴ In some jurisdictions and contexts, substantive

⁴² CEDAW, "General Recommendation No. 19: Violence Against Women," online: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>.

⁴³ Hilary Charlesworth, "What Are Women's International Human Rights?" in Rebecca Cook ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 58.

⁴⁴ See Canadian Housing Equality Resources for another concrete example involving a formal and substantive equality approach in relation to a bank loan, available online: <http://www.equalityrights.org/cher/index.cfm?nav=hr&sub=mod>.

equality has been promoted as the most conducive to women's rights and empowerment.⁴⁵ In other contexts, however, women might consider substantive equality agendas problematic because they undercut their bid for parity and reinforce a "separate but equal" agenda which ultimately reinforces their social and economic marginalization.

Intersectionality represents the second important conceptual tool that legal analysts and strategists must bring to bear on their quest to understand women's lived realities are part of fashioning an access to justice strategy. One of the most pressing questions within women's rights literature is: in seeking to understand women's experiences, when and how does the category "women" obscure the differences among women thus silencing some women's suffering and/or privileging other women? Women's experiences across the globe have demonstrated the importance of careful analysis of women's lived realities that are freed from essentializing assumptions about how law impacts upon women and what legal strategies should be fashioned to promote women's equality.

Although the term "intersectionality" is not always explicitly used by women's rights scholars, the concept of intersectionality proves an important analytical tool for women's rights advocates across the globe. Intersectionality recognizes that women do not share the same experiences, agendas or interests and that they can be divided by other categories of identity such as class, race, sexuality and geography.⁴⁶ For example, critics have argued that when UN bodies lobby governments to ensure that women have access to individual land title, they fail to account for indigenous women's experiences.⁴⁷ Others point out that international norms governing work standards focus on the public sphere and thus sideline violations that take place against domestic workers, for example.⁴⁸

Questions of intersectionality arise in different ways but have persisted across the women's rights agenda.⁴⁹ Legal advocates have pointed to the various sites of intersectionality in law and have emphasized how the concept can lead to be a better understanding of various women's needs and thus a better informed access to justice strategy. First, intersectionality analysis can reveal the way in which legal norms impact upon different women differently. Critics often observe that law focuses on the problems and promotes the interests of elite women over marginalized women. One can point to examples of such claims in virtually every jurisdiction around the

⁴⁵ See for example, Savitri W.E. Gooneskere, "The Concept of Substantive Equality and Gender Justice in South Asia available online: <<http://www.docstoc.com/docs/3539421/substantive-equality>>; See also Reem Bahdi, Women's Access to Justice in the Middle East (IDRC, 2007) available online: <http://www.idrc.ca/en/ev-127301-201-1-DO_TOPIC.html>

⁴⁶ Indeed, as Avtar Brah and Ann Phoenix, put it, "what we call 'identities' are not objects but processes constituted in and through power relations" "Ain't I A Woman? Revisiting Intersectionality" (2005) 5(3) Journal of International Women's Studies 75 at 83.

⁴⁷ Ellen-Rose Kambel, "A Guide to Indigenous Women's Rights Under the International Covenant on the Elimination of all Forms of Discrimination Against Women," (2004) Association of Women's Rights in Development and Forest Peoples' Programme, online: <http://www.forestpeoples.org/documents/law_hr/cedaw_guide_jan04_eng.pdf>.

⁴⁸ Charlesworth, *supra* note 19; and Joanna Erdman, "Human Rights in Health Equity: Cervical Cancer and HPV Vaccines" (2005) 35 Am J. L. & Med. 365, using cervical cancer as an example of health inequity between women.

⁴⁹ Center for Women's Global Leadership, "Background Briefing on Intersectionality" online: <<http://www.cwgl.rutgers.edu/globalcenter/policy/bkgdbrfintersec.html>>.

world.⁵⁰ In Canada for example, the vast majority of the case law involving the equitable breakdown of property after divorce has been generated by women whose families hold some assets. The law does not concern itself by and large with the distribution of debt. Yet, women find themselves burdened by debt – the significant number of family law reported decisions thus do not concern or help them because the law does not recognize their realities or speak to their problems. Consider too the *Arab Charter for Human Rights*. The *Charter* does not clearly extend basic protections to foreign domestic workers who tend to be women and national laws tend to exempt these workers from protection although their work conditions are often unsafe and unstable.⁵¹

Second, different jurisdictions have different cost and cost rules; however most require some form of payment to lawyers and/or courts in the form of disbursements and advances which deter women from seeking out solutions to their problems using the formal legal system. Related rules (such as the two way cost rule which prevails in diverse jurisdictions dictates that the losing party pays the costs of the winning party) also act as significant deterrence for women who lack financial resources. In some jurisdictions, legal aid clinics focused on women's needs help fill the gap.⁵² Third, factors like geographic location and the language of service of legal institutions can impact upon women's access to justice in different ways. Accessing state administrative agencies, courts and/or legal clinics can be difficult for those who live outside of urban centers. Language can pose a similar barrier for some women. And, cultural and class norms within the legal system can work against some women. Women from different cultures and classes can be loathe to use the mainstream legal system in part because they question the ability of the system to understand their needs or to deal fairly with them or their family members who might be implicated by the woman's claim.⁵³

⁵⁰ See for example Kimberlé Williams Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" in Martha Albertson Fineman and Rixanne Mykitiuk, ed., *The Public Nature of Private Violence*. (New York: Routledge, 1994), 93 and available online:

<<http://www.wcsap.org/Events/Workshop07/mapping-margins.pdf>> This remains an important conceptual work. The literature concerning the different needs of women based on social hierarchies beyond gender constructs is quickly growing. See for example Dinusha Panditaratne, "Towards Gender Equality in a Developing Asia: Reforming Personal Laws Within a Pluralistic Framework" (2007) 32 N.Y.U. Rev. L. & Soc. Change 83 (who points to the different forms and levels of discrimination faced by women from different groups); and Nikki Naylor, "Killing Her Softly – "HIV/AIDS and the Right to Health Care For Women in Sub-Saharan Africa" 102 Am. Soc'y Int'l L. Proc. 389 (critiquing the failure of a Social African Court to order the state to provide milk formula for HIV positive mothers)

⁵¹ See generally the *Arab Human Development Report 2005: The Rise of Women* (UNDP) available online: <http://books.google.ca/books?id=bW3dz2EdjzWC&pg=PA121&lpg=PA121&dq=domestic+workers+in+arab+countries&source=bl&ots=IR-6E3J9Uj&sig=W3E1hM0WLIYtoa0V7w_nDpHgVx8&hl=en&ei=ld_tSoSJBoXmM-KvgIQM&sa=X&oi=book_result&ct=result&resnum=4&ved=0CBcQ6AEwAw#v=onepage&q=domestic%20workers%20in%20arab%20countries&f=false> at 121

⁵² See for example the website of the National Legal Aid Clinic for Women (Zambia) available online: <<http://www.nlacw.websitezambia.net/Help/FAQs.php>>. It is unclear how women who do not have a telephone, for example, are to establish and maintain contact with the clinic.

⁵³ See for example Janet E. Moon, "Violence, Culture & HIV/AIDS: Can Domestic Violence Law Reduce African Women's Risks of HIV Infection?" (2007) 35(1) Syracuse J. Int'l L. & Com. 123 (arguing that domestic violence laws only offer assistance when women are willing to invoke protection orders that separate family members from each other.) In the Canadian context, women from minority backgrounds have indicated some unwillingness to use the legal system because of the racism inherent within the system. In other cases, cultural power structures worked against the women. See for example Sharon Donna McIvor, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights" (2004) 16 Can. J. Women & L. 106.

Moreover, legal victories for some women do not necessarily amount to legal victories for other women.⁵⁴ My research did not uncover any significant studies that specifically use empirical or comparative methods to determine to what extent some women might benefit from the law while others do not because of intersecting identities. Nonetheless, individual cases highlight that women benefit differently from law and reinforces that their needs cannot be essentialized. The experiences and needs of women living in poverty, for example, are different (and not simply more intense) than women who do not suffer poverty. The debate around divorce laws in Egypt is also illustrative, with some claiming that the no-fault divorce regime introduced by the new laws simply favours wealthy women who can afford to give up financial entitlements in favour of divorce.⁵⁵

In what sense then is "gender" a helpful analytical tool? Sometimes, it can be important to abstract across women's differences and reinforce the commonality of women's experiences. The need for commonality comes up most forcefully in the FGM (Female Genital Mutilation - the term itself is a hotly contested) debate with some advocates denouncing the practice while others denouncing the campaign against FGM itself as "western"⁵⁶ or worry that it is disconnected from a larger global patterns of violence against women thereby perpetrating an unhelpful image of the African woman as victim.⁵⁷

Nonetheless, intersectionality analysis warns against essentializing women's experiences and points to the need understand through research and analysis how dissecting identities transform women's experiences as part and parcel of thinking through the most effective access to justice strategy in any particular case or as part of an overall strategy of advocating for law reform in any given context. There is no "one size fits all" solution; instead, advocates for reform must be aware of the range of conceptual tools that can be brought to bear on women's human rights advocacy. A case by case approach to understanding how different legal priorities and strategies impact upon different women is required throughout the access to justice process. The main questions are: who gets to decide what is an important issue for women, under what circumstances and using which criteria? These questions prove especially acute in conflict and post-conflict societies where critics charge that reform and development priorities are not

⁵⁴ I had hoped to examine the famous *Unity Dow* case from Botswana which determined that children of women who marry foreign nationals could gain Botswanian nationality to determine if this case had a positive impact on the lives of women across social and economic lines or whether its positive influence was limited to elite women only. The plaintiff in this case, Unity Dow, was a judge of the High Court of Botswana. I have been able to uncover one article which concludes that attitudes towards foreigners hardened after the decision. While the article does not directly address the question of whether elite versus marginalized women benefitted differently from the case, it does reinforce the conclusion that a legal victory for some may not be a legal victory for others. See Francis B. Nyamnjoh, "Local Attitudes towards Citizenship and Foreigners in Botswana: An Appraisal of Recent Press Stories" (2002) 28(4) *Journal of Southern African Studies* 755.

⁵⁵ See *Bahdi supra* note 45 for a brief overview of the debate.

⁵⁶ L. Amede Obiara, "Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision" (1997) 47 *Case W. Res. L. Rev.* 275.

⁵⁷ Gloria T. Emeagwali, "Editorial: Female Circumcision in Africa." (1996) 3(2) *Africa Update*, Special Issue: Female Circumcision in Africa. This is an example of how the category "woman" is in fact useful to help understand specific experiences.

necessarily defined through transparent political processes or by those who have a "stake in the system" but instead are set by those who are motivated by individual or external interests.⁵⁸

5. Texts and Contexts: If Only the Texts Were the Main Barriers to Equality

Generally speaking, there are few jurisdictions where there are no substantive norms or interpretive strategies that cannot –*strictly as an interpretive matter*– be harnessed in favour of women’s equality, once the specific end goal of law reform is defined. Language is law’s medium and since language is open-textured, it has within it the possibility of re-interpretation. Moreover, every jurisdiction has its own interpretive practices or conventions which allow decision-makers and users of the law to decide between various possible interpretations. There will thus likely always be, again as a strict matter of interpretation, a legal argument that is consistent with equality based on some combination of local, regional or international norms and the conventions of interpretation and normative values which decision-makers invoke to prioritize the various norms at their disposal.

Of course all jurisdictions boast multiple legal norms which often conflict; some are rights-enhancing for women while others prove rights-detracting. The sites of conflict between local laws such as customary laws, national law, regional and international norms can take on various forms and exist for many reasons. In some cases, local or customary laws are allowed to exist by governments that seek to politically appease or appeal to certain groups (the personal status laws in various Asian jurisdictions serve as an example). In other cases, national laws such as constitutional guarantees of gender equality might conflict with international laws. In still other cases, regional strategies and laws might conflict. The quest for reproductive rights in South America, for example, might lead to an emphasis on women's rights to control her body. This in turn can be used by some to argue in favour of sex selection in abortion for example.⁵⁹

How can apparent contradictions be resolved in favour of respecting women’s rights? Several interpretive strategies might be adopted depending on the circumstance. First, it is important to bear in mind the difference between formal and substantive equality approaches and the need to always assess laws and policies against their particular social context to determine if the laws or policies ameliorate or perpetuate patterns of discrimination. For example, in the case of the women’s right to control her body in South America, this right represents a response to a pattern of discrimination against women. The same right in India, however, can be claimed and articulated in a way which perpetuates gender discrimination as the sex selection example illustrates. Ultimately, the goal is not to mechanically apply rights claims in any given context but to carefully and deliberately assess the impact of a rights claim on ameliorating specific injustices and patterns of discrimination.

⁵⁸ Reform in Palestine, for example, is driven by donors in a number of ways: they liaise with decision-makers through formal and informal channels, they fund specific programmes after consultations with select individuals, and they criminalize certain coalitions and associations (such as working with entities that they deem terrorist). Legal reform continues yet Palestinians have insufficient input into the process.

⁵⁹ The problem of sex selection is reviewed and analyzed in Radhika Balakrishnan, “Social Context of Sex Selection and the Politics of Abortion in India” in Gita Sen and Rachel C. Snow eds., *Power and Decision: the Social Control of Reproduction*, (Boston:, Harvard University, Center for Population and Development Studies, 1994) 267.

Second, it is possible to use careful and detailed legal analysis to read away any perceived conflict thereby demonstrating that the laws which appear or have hitherto been interpreted as rights-detracting have been misunderstood. Asma Barlas, for example, has sought to demonstrate that Islamic Shar'ia proves consistent with women's equality and self-determination claims.⁶⁰ The second approach adopts the position that the discriminatory laws must be judged by and ultimately give way to higher set of values, norms or principles such as might be contained in national constitutions or basic laws or as might be articulated in international or regional human rights instruments.⁶¹ Arab countries, for example, have constitutions which can be interpreted progressively in favour of women's equality. And, although countries tend to file reservations when they ratify international human rights treaties such as the Women's Conventions, these reservations must themselves be interpreted in a way that does not defeat the object or purpose of the treaty itself, namely women's dignity and equality.

Regardless of the interpretive strategies invoked, there is no substitute for careful and creative legal argumentation by experienced and dedicated human rights oriented lawyers who understand the various tools and sources that can be marshalled in the name of equality. But, of course, it is axiomatic that the text itself is not determinative or dispositive of women's lives or law's influence. Ultimately, as women's experiences across the globe have demonstrated, fashioning a good textual argument is not the most difficult part of the legal strategy, the most difficult part involves the interpretive context in which the text is read and understood. Consequently, women's needs are misrepresented and their rights ignored. The world is fraught with examples. Of particular note is the secondary status that social and economic rights have in relation to civil and political rights within both national and international laws.⁶² Given the feminization of poverty around the world, the priority of civil and political rights over social and economic ones within the larger human rights system represents an issue of pressing concern for women and women's rights advocates. Yet, the general reluctance of international bodies to interfere with the market mechanisms of a given state coupled with the low priority given to women's experiences as opposed to men's needs within the international system have served to entrench the lower hierarchy attached to social and economic rights.

Much depends on how the actors within the legal system regard themselves and envision their roles. In some jurisdictions, for example, judges regard themselves as defenders of human dignity and are willing to use techniques such as purposive interpretation to advance human rights. In other jurisdictions, judges regard themselves as "neutral" enforcers of the laws on the books and decry "judicial activism."⁶³ While it is unlikely that a single conception rules out the other in any given jurisdiction, it is important to understand whether there is a dominant trend or understanding of "rule of law" within the judiciary for the purposes of assessing both the efficacy of pursuing change through the courts and/or defining a particular litigation strategy and

⁶⁰ Asma Barlas, *Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur'an* (Austin: University of Texas Press, 2002)

⁶¹ Lama Abu-Odeh, "Modernizing Muslim Family Law: The Case of Egypt" (2004) 37 V and. J. Transnat'l L. 1045.

⁶² Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective On its Development* (Oxford: Oxford University Press, 1998).

⁶³ See Jamie Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" (1989) 37 Am. J. Comp. Law 495.

orientation. The following example involving South African Judge Albie Sachs proves instructive.

At first sight, he had intended to throw out an appeal on behalf of Mrs M, who was facing four years in jail for up to 40 counts of credit card fraud that she had committed while under a suspended sentence for similar offences. "I remember drafting an extremely dismissive response. I said: 'This doesn't raise a constitutional question. She simply wants to avoid going to jail. She doesn't make out a case, and her prospects of success are zero.' "

It was a female colleague, another of the 11 green-robed judges in South Africa's constitutional court, who insisted that the case be heard. She argued that the human rights of the accused woman's children were not being looked at separately.

She said: 'There is something you are missing. What about the children? Mrs M has three teenage children. She lives in an area that we politely call fragile, an area of gangs, drug-peddling and a fair amount of violence. The indications are that she is a good mother, and the magistrate gave no attention to the children's interests.'

The minute my colleague spoke to me about the importance of the three teenage children of Mrs M, I started to see them not as three small citizens who had the right to grow up into big citizens but as three threatened, worrying, precarious, conflicted young boys who had a claim on the court, a claim on our society as individuals, as children, and a claim not to be treated solely as extensions of the rights of the mother, but in their own terms."⁶⁴

As Justice Sachs' story of judgment illustrates, oppression is often not about the need for new laws but about the willingness of those who hold power to use their power for the sake of the oppressed, including women.⁶⁵

In most jurisdictions, women have substantial legal protections; however, their rights are not fully respected or implemented. For example, the right to health in sub-Saharan Africa is a recognized right but women with HIV-AIDS are often ignored by governments in defining policies and programs that advance the right to health.⁶⁶ Similarly, factors such as delay, corruption, deeply engrained local attitudes and questionable reliance on customary and religious

⁶⁴ Jackie Kemp, "Life Sentences" *The Guardian*, (1 July 2009) online:

<<http://www.guardian.co.uk/society/2009/jul/01/albie-sachs-interview-childrens-rights>>. Compare this approach to the decision by Canada's Federal Court in *Baker v. Canada*, 2005 CAF 185 (2005) wherein the presiding judge determined that the deportation of a mother did not engage the rights of her children (overturned by the Supreme Court of Canada). See more generally Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford: Oxford University Press, 2009) for a discussion of the role of human dignity in decision-making. While I give the above example as a positive use of the underlying right to dignity, I am troubled by the fact that the claimant was not clearly judged as someone worthy of dignity in and of herself.

⁶⁵ I am mindful of the problems that flow when women are given recognition only because their children's rights are violated but not because they themselves have been treated badly. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 for an example of a case which recognized the rights violations faced by the children in an immigration case but which did not fully consider the stereotyping and other rights violations visited upon their mother.

⁶⁶ *Naylor*, *supra* note 50

norms limit women's rights in Bangladesh.⁶⁷ Rights enforcement involves overcoming a host of substantive, procedural and social hurdles to bridge the gap between rhetoric and reality. The substantive hurdles can include factors such as the insistence that particular interpretations of Islamic Shar'ia trump rights recognized in national and international human rights instruments. Procedural hurdles include the high cost of getting before a decision-maker who might reinforce a given right while social hurdles include such things as the propensity of police and other state agents to consider violations of women's rights as matters falling within the private sphere and therefore not the proper subject of state interference as well as social stigmas against women invoking rights-talk.⁶⁸

Judges and other legal actors are members of their societies and we cannot expect them to make decisions in a vacuum. They appeal to the norms of their societies to both consider and emphasize the legitimacy of their own decision-making. This fact coupled with the recognition that women's different needs suggest the importance of "de-centering" law⁶⁹ and assessing how other non-legal strategies (such as sit-ins or public education) might be necessary to transform a given situation or scenario. In any given context, the trade-offs as well as the possible synergies that can be created between legal and non-legal strategies must be assessed.⁷⁰ The next section of this paper identifies the various strategies that can be invoked.

6. "Constrained Legalism:" Combining the Legal and Extra-Legal

As the paper has stressed, legal strategies often cannot be successful on their own but must be buttressed with various non-legal strategies and supports. The particular combination of legal and extra-legal strategy that is invoked depends on the context. The following examples are intended to illustrate alternative ways in which law can be invoked and women's access to justice promoted by weaving non-legal strategies and supports into access to justice.⁷¹

Recognizing that the very barriers that perpetuate women's social and economic inequality also keep them from accessing their legal rights, various legal clinics and advocates around the world have moved from simply providing direct legal representation to ensuring counseling and health care for clients and pursuing lobbying and educational efforts with legal decision-makers such as

⁶⁷ Janice H. Lam, "The Rise of the NGO in Bangladesh: Lessons on Improving Access to Justice for Women and Religious Minorities" (2006) 38 Geo. Wash. Int'l L. Rev. 101.

⁶⁸ For an overview of the interpretive, procedural and social barriers to rights implementation of women's rights in the Middle East, see *Bahdi*, *supra* note 45.

⁶⁹ *In Feminism and the Power of Law*, Carol Smart argues that we need to de-center and "think of non-legal strategies and ... discourage a resort to law as if it holds the key to unlock women's oppression." *supra* note 28 at 5.

⁷⁰ For a good case study, see: Cathi Albertyn, "Using Rights and the Law to Reduce Women's Vulnerability to HIV/AIDS, A discussion paper for the 13th Annual AIDS Conference on "Putting Third First – Critical Legal Issues and HIV/AIDS" available online: <<http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=372>> ("The South African experience warns us, once again, that it is important to be very clear about the value and limitations of strategies based on human rights and the law, especially as they relate to gender equality and HIV/AIDS. We cannot always assume that they are effective instruments of progressive social change for women. Nor can we determine appropriate strategies without an understanding of the broader legal, political and economic context.") at 13.

⁷¹ For a discussion of the relationship between law and norms, see William Bogart, *Permit But Discourage* (Oxford: Oxford University Press, forthcoming) especially chapter 4. See also John N. Drobak, ed. *Norms and the Law* (Cambridge University Press, 2006) and Eric A. Posner, *Law and Social Norms*, (Harvard University Press, 2000).

judges and police.⁷² Moreover, women have sought procedural alternatives to individual litigation. Where social norms or geography limit access to formal legal mechanisms such as courts, marginalized women might pursue informal justice mechanisms (sometimes referred to as "tribunal justice" or "alternative dispute resolution.")⁷³ In other contexts, public interest litigation and/or class action litigation have proven effective for women's advocacy where such forms of access to courts exist.⁷⁴

Where women have sought to pursue litigation through the courts, they have also turned to extra-legal strategies in support of their litigation efforts and vice-versa. In such cases, women invoke either implicitly or explicitly their legal rights but claim those rights in the informal public space rather through or sometimes in addition to pursuing formal mechanisms such as courts. The campaign by Fawiez Al-Kurd against her family's forced eviction by Israeli authorities in Jerusalem represents such an example. The matriarch set up a tent near the site of her demolished family home and refused to leave because she wanted justice.⁷⁵ Of course the effectiveness of such public appeal or education strategies depends in large part on the values of the public to which one is appealing. The final message is that the development of legal strategies requires broad consultation to determine which legal issues are most important for which groups of women to ensure the maximum impact of resource allocation, an understanding of the goals that the women would like to achieve, an analysis of which strategies best fit those goals along with an assessment of the resources needed for implementation, enforcement and measurement of ultimate impacts.

Lawyers and legal scholars have partnered with civil society organizations including human rights NGOs, universities and the media to create coordinating strategies that are both legal and extra-legal.⁷⁶ These include: offering an alternative philosophy and interpretation of norms that

⁷² See for example Upala Devi Banerjee, Colin Gonsalves and Vinay Naidoo, "Using Rights-Based Strategies to Secure Land Rights for Poor and Vulnerable Groups: The Nijera Kori Experience in Bangladesh" UNDP online: <http://www.unescobkk.org/fileadmin/user_upload/appeal/LLP/Unit1.pdf>

⁷³ There is an on-going debate about whether informal justice proves better or worse than formal justice mechanisms. See Bahdi supra note 45.

⁷⁴ Avani Mehta Sood, *Litigating Reproductive Rights: Using Public Interest Litigation and International Law to Promote Gender Justice in India* (New York: Center for Reproductive Rights, 2006) online: <http://reproductiverights.org/sites/crr.civicactions.net/files/documents/media_bo_India1215.pdf>. The Women's Legal Centre in Capetown South Africa distinguishes between class actions and public interest litigation and prefers the latter because the former binds all members of the class (after they opt in) while the latter leaves open other litigation options in the future. See www.wlce.co.za

⁷⁵ Alternative Information Center, "Al Kurd Family Tent Destroyed for Fifth Time by Jerusalem Municipality" 23 February 2009 online: <<http://www.alternativenews.org/english/1665-al-kurd-family-tent-destroyed-for-fifth-time-by-jerusalem-municipality.html>>.

⁷⁶ A number of useful case studies involving different approaches to women's human rights strategies can be found in UNDP "A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice" online: <<http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/>>. In addition, I have surveyed a number of civil society organizations in various regions focused on specific issues - Africa (HIV/AIDS), Central/Eastern Europe (Domestic Violence), Middle East (Reproductive Rights), Africa (Armed Conflict), Americas (Property Rights) and international organizations that undertake some form of legal advocacy ranging from lobbying for legislative reform to litigation to monitoring and evaluation. Each of these organizations claims some level of success on their websites but few offer indicators or formal evaluations. In all fairness to these organizations, their ability to undertake their activities are themselves measures of success. However, there are few resources dedicated within law to defining how these activities ultimately change the social landscape.

oppress women;⁷⁷ generating public debate over a particular injustice concerning women's democratic participation and violations of women's rights thus creating understanding of the need for broader systemic reforms;⁷⁸ bringing forward cases in local, national, regional or internal fora in ways that pay attention to local needs and limitations;⁷⁹ coordinating political advocacy to consolidate systemic changes;⁸⁰ generating deeper understanding and awareness of women's rights issues by policy-makers and others through studies and analysis; and appealing to broad based social norms to generate public support for change.

Regardless of the approach taken, strategies and action must be developed by those who have knowledge of the social context in which law is operating. This requires legal experts and change agents to work with civil society organizations to understand both women's realities and the relationships that sustain the status quo. The following paragraphs identify specific ways in which civil society organizations and women who hold positions of power can help promote women's rights more broadly. They are intended as examples of isolated moves that might be made by those who seek to change the status quo. The various moves can be woven into a more comprehensive strategy that can be developed and devised through a tactical mapping exercise which offers a more strategic approach to the promotion of justice and access to justice. Tactical mapping⁸¹ engages lawyers, civil society organizations and those who hold positions of power in a network designed to coordinate knowledge and relationships in a process of systemic change through the invocation of a range of context specific initiatives.

Tactical mapping focuses on relationships. Human rights abuses are sustained by a complex system of relationships that mutually reinforce the role of the abuser. Some of these relationships are hierarchical or otherwise structural; others are informal. Each of these relationships is a potential site of intervention that would respond to a different tactic.

Tactical mapping thus begins by identifying the relationships that sustain rights abuses, identifies the range of possible tactics that might be deployed within this relational web, catalogues the change tactics currently being engaged, identifies which actors are affected by these tactics, identifies the individuals and institutions that remain unaffected and determines what tactics can

⁷⁷ Acclaimed international human rights and Muslim scholar, Abdullahi An-Naim argues that states cannot and should not be religious in nature –indeed, such a conception of the state proves inconsistent with Shar'ia. States, on the contrary, should permit divergent practices and promote pluralism. *Islam and the Secular State* (Cambridge: Harvard University Press, 2006)

⁷⁸ See for example the website of BRAC which works in Asia and Africa online: <<http://www.brac.net/index.php?nid=127>> “BRAC introduced the Human Rights and Legal Services (HRLS) programme in 1986 when a BRAC study on power relations revealed that social conflicts and tensions in rural areas are mostly linked to land and human rights violations and violence against women. Poor people involved in such conflicts are often denied justice in the village shalish (arbitration). They also suffer severe financial crisis due to resource drains if such conflicts lead to court cases.”

⁷⁹ See for example Lionel Siriwardena, Case Study: Inclusive Governance in Sri Lanka. Kirinda Division of the Hambantota District (2007) UNDP online: <<http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/docs/CaseStudy-10-SriLanka-AidDelivery.pdf>> which documents discrimination and inequality in tsunami relief programmes.

⁸⁰ See for example the discussion about the role of NGO's in Shahla Moazami, “Access to Justice for Disadvantaged Groups: The Case of Women in Iran” (2007) UNDP online: <<http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/>>

⁸¹ See the materials available at New Tactics in Human Rights, online: <<http://www.newtactics.org/en/tactical-mapping>>

reasonably be deployed and which allies can be meaningfully engaged. Tactical mapping understands that law has an important but not exclusive role to play in social change. Implementation of tactical mapping strategies require that various organizations and individuals “develop the capacity to collaborate on an overall strategy aimed at disrupting the system of relationships embedded in human rights abuses.”⁸² Collaboration is essential because most organizations can only adopt and implement one or two tactics given resource and knowledge limits. But, the status quo generally does not yield to a single tactic. Multiple strategies are needed. The following paragraphs identify isolated, though complex, strategies that have been successfully deployed, to varying degrees, by various individuals and organizations to effect change. They are intended to be illustrative only and can be rolled into a larger tactical mapping strategy.

By undertaking policy-oriented and fact based research, civil society organizations can reveal gender discrimination and demonstrate where individual experiences reflect systemic biases, inequalities and power structures.⁸³ They can, moreover, provide critical analysis of prevailing legal strategies that appear progressive but which have the unintended effect of privileging some women’s claims at the expense of others. Studies of cases in South Africa, for example, reveal that women can achieve victories in court where the legal strategy advances an image of them as “good mothers.” “When advocating or litigating for gender justice, often practical interests of women’s needs (arguing a case in terms of women’s stereotypical roles) takes precedence over strategic arguments such as how to shift and change society and its valuation of women and men over the long term.”⁸⁴ Women’s rights scholars and reformers have joined forces to educate themselves and brainstorm new equality enhancing approaches.

Civil society organizations can also work to generate statutory reform. In Fiji, for example, women were able to advance a new Family Law Act by helping to mobilize both the community and advocates within the political system in favour of such reforms.⁸⁵ Civil society organizations have also played an important role in educating decision-makers within the legal system. In South Asia, for example, NGOs were able to contribute to judicial understandings of inequality and help judges come to grips with their own stereotypes and the myths they brought to decision-making concerning violence against women.⁸⁶ In other jurisdictions, they have supported cause

⁸² Center for the Victims Torture, “Tactical Mapping” online: <http://www.campusactivism.org/server-new/uploads/tactical_mapping_article.pdf> at 2.

⁸³ See for example the website of the Center for Social Research in India: online: <http://www.csrindia.org/vision_mission.html>

⁸⁴ Maitrayee Mukhopadhyay, Gender and Access to Justice in Sub Saharan Africa: Conference Report (Presented KIT-CALS Conference, Johannesburg, 29-30 October, 2008) online: <http://www.kit.nl/net/KIT_Publicaties_output/ShowFile2.aspx?e=1530>

⁸⁵ Pacific Regional Rights Resource Team and Fiji Women’s Rights Movement, Fiji’s Family Law: A Case Study of Legislative Advocacy and Campaigning in Fiji, 2007 UNDP online: <http://regionallcentrebangkok.undp.or.th/practices/governance/a2j/docs/CaseStudy-04-Fiji.pdf> “this study documents the process taken by the two organizations, from 1991 to 2003, to achieve the successful passage of the Family Law Act in October 2003. It outlines the strategies used, mitigating factors that enabled change and the lessons learned from the struggle to empower the lives of Fiji women through legislative change. In particular it attempts to record the ways in which the rights-holders were able through the FWRM to influence and shape the final law passed so that it better reflected the needs and aspirations of Fiji women, particularly disadvantaged women.” at 8.

⁸⁶ See for example the judicial education work of SASHKI in India as chronicled in K. Geeta, *Walking Wisdom: A Creative Learning Experience* (New Delhi: United Nations Development Fund for Women (UNIFEM) and SAKSHI, 2005) Abstract available online: <<http://www.unifem.org.in/violenceagainstwomen.html>>

lawyering⁸⁷ and public interest litigation and have helped bridge the divide between elitist legal strategies and broad based social movements which adopt a more participatory approach to social change.⁸⁸ It should be noted, however, that legal advocates and/or civil society organizations - even those with a women's rights agenda - can themselves perpetuate and entrench inequality. For example, the organizations might not be sufficiently in tune with marginalized women and may not be sufficiently attentive to the issues raised by intersectionality analysis.⁸⁹

Alliances with women who hold political or economic power can also generate some legal gains for women equality-seekers. It goes without saying that placing women in positions of authority does not in and of itself advance democratic governance and the rule of law. Indeed, women can be members of social, political and economic elites and can perpetuate the exclusion from and oppression by law of marginalized women.⁹⁰ Women who enter the halls of power face what has been termed "the double bind," even if they are inclined towards advancing women's equality. On the one hand, they must conform to the values and principles of their home institution and its culture if they purport to be heard within that culture. On the other hand, they must seek to change the culture in ways which might ultimately undo the institution and perhaps render them ineffective as individuals. And, of course, women do not always advance the rights of other women simply because they share the same gender. That being said, powerful though not always comfortable alliances have formed between women in decision-making positions, feminist researchers, women's organizations and policy-makers to advance democratic governance and the rule of law. A good example might be the development of legal norms in the Tribunal set up to try war crimes in Rwanda.

⁸⁷ Various definitions of cause lawyering have been advanced: "one who works out of the professional mainstream at financial, if not personal, cost, engaging in moral activism for marginalized clients" (Parker); "lawyering for the good" (Menkel-Meadow); "speaking law to power" (Abel); "Impact lawyering" (Kilwein) [ie: seek to win cases to establish good precedents for future cases]; "not-for-profit legal work with, and/or on behalf of individuals or groups who cannot afford to hire a lawyer, the ultimate aim of which is to achieve progressive social change" (Meili); "activist lawyers who use law as means of creating social change" (Etienne); "lawyers who use legal skills to pursue ends and ideals that transcend client service" (Scheingold and Sarat). I am grateful to my colleague at the University of Windsor, Jasminka Kalajdzic who surveyed the cause lawyering literature in preparing a lecture about cause lawyering for our access to justice course. Professor Kalajdzic concludes that "all definitions share a common thread: the lawyer is not a hired gun, or a neutral advocate, for client's interests; the lawyer uses litigation to achieve political, social, cultural or economic goals, beyond any particular redress for the client" and "what differentiates conventional lawyers from cause lawyers is the intent and motivation to pursue social change." Jasminka Kalajdzic, Lecture: "Cause Lawyering, Access to Justice," Week 9 (November 14, 2009), University of Windsor, Faculty of Law

⁸⁸ See for example the call for NGO's to take up public interest litigation in Bangladesh, Asian Human Rights Commission, "Public Interest Litigation Should Be Filed On Extrajudicial Killings By Law Enforcement Agencies (August 28, 2009)" online: <<http://www.ahrchk.net/statements/mainfile.php/2009statements/2196/>>

⁸⁹ See for example Alicia Carra, "Creating Law and Policy with Women's Voices: Feminism in Action" (2009) 39 U of Balt.L.F. (arguing that lawyers should play a supporting role in the design of policy and law by those who are the experts in their own oppression).

⁹⁰ In the Canadian context, consider the Leilani Muir case whose fight against eugenics revealed the extent to which leading Canadian feminists espoused and promoted eugenics against immigrant and poor women. *Muir v. The Queen in right of Alberta*, 132 D.L.R. (4th) 695.

Prosecutor Louise Arbour worked closely with women's rights organizations and feminist lawyers/researchers to help shape the law.⁹¹ On May 27, 1997, a coalition of women's organizations filed an *amicus curiae* brief in the case against Jean-Paul Akayesu, requesting an amendment of the indictment and supplementation of the evidence to ensure the prosecution of rape and other sexual violence. On June 17, 1997, Arbour amended the indictment against Jean-Paul Akayesu to include charges of rape and inhuman treatment. On October 2, 1998, the International Criminal Tribunal for Rwanda sentenced former mayor Jean-Paul Akayesu to three life sentences for genocide and crimes against humanity and to 80 years for other violations including rape and encouraging widespread sexual violence. The groundbreaking decision acknowledged for the first time that rape can constitute an act of torture and genocide.⁹²

Some scholars have pointed to the development of “demosprudence” which seeks to build collaborative relations between formal elites such as judges and legislators with “ordinary people.” Demosprudence “emphasizes the role of informal democratic mobilizations and wide-ranging social movements that serve to make formal institutions, including those that regulate legal culture, more democratic.”⁹³ It builds on the idea that judges and other legal decision-makers can gain a source of democratic authority by appealing to and engaging those whom their decisions affect. Demosprudence can be exercised through a myriad of techniques, including the manner in which a legal decision is written and addressed. Judges who write demosprudentially write for society at large and not simply their colleagues or the litigants before them. They consciously align themselves with a movement that “mobilizes to change the meaning of the Constitution over time.”⁹⁴

7. Conclusion

Access to justice for women must be “informed by a critical appreciation of *law's limits* that seeks to exploit *law's opportunities* to advance transformative goals.”⁹⁵ Law can offer a medium to confront the injustices and unfairness built into other systems of political, social and economic ordering. Women's rights advocates have won significant victories through law and have generated gains for women's dignity and equality. However, law can also be a place where women's rights are not only silenced but where social, economic and political power structures are replicated and work against women's rights. Rule of law programming focused on women's rights and democratic governance must therefore begin with an understanding of the limits of law and the barriers to invoking law as a tool of social change. Access to justice strategies can only be fashioned when these barriers are properly understood. The main barrier to women's equality is not the law, understood narrowly as legal texts because all laws can be interpreted progressively when read against norms from national, regional or international sources. The challenge is to convince decision-makers to use their power in favour of women's rights. Often,

⁹¹ See for example the letter from various women's human rights organizations urging that charges against Jean Paul Akayesu dated May 27, 1997, online:

<http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/Akayesu/Akayesu_970527.pdf>

⁹² The dossier of documents filed in the Prosecutor v. Akayesu can be found online:

<http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/index_en.php#6>

⁹³ Lani Guinier, “Courting The People: Demosprudence and The Law/Politics Divide” (2009) 89 B.U.L Rev. 539 at 545.

⁹⁴ *Ibid.* at 546.

⁹⁵ *Cummings, supra*, note at 41.

addressing this challenge requires not only legal arguments but extra-legal campaigns such as public education, political lobbying and/or judicial education. Such strategies must be coupled with a clear understanding of how law impacts upon and influences women's lives as a pre-requisite to not only fashioning effective legal arguments but also putting into place the supports that women often need before they can enter into the legal arena.

8. Critical Areas for Future Research

This paper has noted in a number of places where debates rather than answers dominate the discussion about women's democratic rights and the rule of law. Any of the issues identified and discussed above can certainly form the subject of sustained analysis in a given region and/or internationally. The following section summarizes the key themes that run through the paper and/or identify the more pressing areas for future research:

- Develop Tactical Mapping strategies focused on key violations against women in specific geographic areas as a model for how to undertake such an exercise in the context of women's democratic development and human rights.
- Mapping Rule of Law programming in key geographic areas with an eye to determining how the rule of law is defined, whose interests are promoted through the particular conception of the rule of law advanced, which interests and voices are silenced through such programming, how rule of law programming has impacted upon marginalized groups, whether rule of law programming has limited other approaches to women's rights, and how various women's groups have responded to rule of law initiatives.⁹⁶
- Case studies that examine the relationship between legal reform and social change. Such studies would involve empirical, longitudinal research into social change that starts with a clear understanding of law and legal systems as well as relevant sociological literature pertaining to social movements and mechanisms for measuring social change.
- Case studies that examine how law is used both in formal legal systems and to structure and organize social relations in a way that has had positive impacts upon women, as well as case studies that illustrate how legal claims have backfired on the rights claimants as both a formal legal claim and a social construct.
- Case studies to evaluate to what extent international institutions, select rule of law NGOs and/or legal advocacy strategies employ intersectionality and substantive equality analysis in defining and appealing to their constituents and/or shaping legal strategies. How does intersectionality and substantive equality factor into assessments of rule of law strategies and programming?
- Case studies to examine the extent women have been able to navigate various legal systems (local, customary, national and international) to advance their rights and what

⁹⁶ Frances Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 (7) Harv. L. Rev. (arguing that the structures of consciousness, notably the consciousness that divides family from market, have limited our analysis of the need for legal reform while also limiting our ability to conceive of remedies).

strategies have proven effective in select contexts. How have secularism and religious norms interacted in a given context? Legal scholars are increasingly advocating legal pluralism as a way of accommodating competing social and legal claims. What are the underlying assumptions of legal pluralism and how does it work to either advance or hinder women's rights claims?

It should be noted that the case studies would ideally be accompanied by conceptual analysis that is rooted in an understanding of law and legal mechanisms across jurisdictions.